IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 7, 2009

MELISSA ANN BISHOP v. RICHARD W. BISHOP

Appeal from the Fourth Circuit Court for Knox County
No. 96298 Bill Swann, Judge

No. E2008-01854-COA-R10-CV - FILED MAY 7, 2009

In February 2004, Melissa Ann Bishop ("Wife") filed a complaint for divorce from Richard W. Bishop ("Husband") following a lengthy marriage. The lawsuit was filed in the Fourth Circuit Court for Knox County, Judge Bill Swann presiding. Wife was represented by the law firm of Lockridge and Valone, PLLC, from the outset, through trial, and for much of the post-trial litigation. This representation lasted for over three years. Much of the legal work on Wife's behalf was performed by attorney Russell Egli ("Egli"), an associate at Lockridge & Valone, PLLC, who left that firm in August 2006 to start his own law firm. Prior to a hearing scheduled for March 2007, Wife discharged the law firm of Lockridge & Valone, PLLC. Wife retained Johnny Dunaway as her new attorney and sought a continuance of the March 2007 hearing because of her change of attorneys. In support of her request for a continuance, Wife filed an affidavit stating that the reason for the discharge of her attorneys was the fact that Mr. Lockridge "sent younger, less experienced associates, who were unprepared to represent me at various stages of the proceedings." One of these associates was Egli. After leaving Lockridge & Valone, PLLC, and starting his own firm, Egli's wife filed a separate lawsuit against Judge Swann. Egli represents his wife in this other lawsuit. After several adverse rulings in her divorce case, Wife rehired Egli and immediately filed a motion to recuse. Wife claimed that Judge Swann had a conflict of interest based on the fact that Egli was representing his (i.e., Egli's) wife in a separate lawsuit filed against Judge Swann. Judge Swann denied the motion to recuse after finding that the only reason Wife rehired Egli was to create a conflict of interest and obtain a new judge to hear any remaining issues. We granted a Tenn. R. App. P. 10 interlocutory appeal to determine whether the Trial Court erred when it denied Wife's motion to recuse. We affirm the judgment of the Trial Court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Fourth Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Russell L. Egli, Knoxville, Tennessee, for the Appellant, Melissa Ann Bishop.

Lori F. Fleishman, Knoxville, Tennessee, for the Appellee, Richard W. Bishop.

OPINION

Background

This contentious divorce proceeding began in 2004 when Wife filed a complaint for divorce following a marriage to Husband of over 22 years. The parties have two children, currently 22 and 14 years old. Mother filed the complaint for divorce in the Fourth Circuit Court for Knox County, Judge Bill Swann presiding. Following a trial before a Special Master and resolution of objections to the Special Master's report, a final judgment of divorce was entered in May 2006. In the final judgment, each party was awarded a divorce based on inappropriate marital conduct of the other party. Mother was designated the primary residential parent for the parties' minor child, with Husband having 158 days per year co-parenting time. Husband was ordered to pay monthly child support in the amount of $825 and also was ordered to pay alimony.

Following entry of the final judgment, numerous post-trial motions were filed by the parties. Among other things, there were issues surrounding unpaid income taxes, Husband's loss of employment, and allegations that Wife intentionally dissipated marital assets.[1] In fact, the number of pleadings filed post-trial is greater than the number filed before trial.

Throughout all of the pre-trial litigation, the trial, and much of the post-trial activity, Wife was represented by the Knoxville law firm of Lockridge & Valone, PLLC. Pleadings were signed by John Lockridge and the firm's two associates, Egli and Sammi Mayfair. Egli performed a substantial amount of work on Wife's case and was the attorney who represented her at the trial before the Special Master. Egli left the law firm of Lockridge and Valone, PLLC, in August of 2006, and became a partner in the law firm of Egli & Stephenson, PLLC.

A hearing on several pending motions was scheduled for March 9, 2007. A few days before the hearing, Wife discharged her attorneys and obtained the services of attorney Johnny Dunaway from LaFollette, Tennessee. Because she had new counsel, Wife sought a continuance of the March 9 hearing date. In support of her request for a continuance, Wife filed an affidavit stating, in relevant part, as follows:

> That I met with my counsel of record, John Lockeridge[2] on May 2, 2007, and a decision was made that he would withdraw as my attorney of record.
>
> That I discharged John Lockeridge as my counsel for he had taken no steps to prepare for the hearing scheduled for March 9, 2007.

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[1] The Special Master found that Wife had intentionally dissipated $86,170 in marital assets on "frivolous" items and in direct contravention of the statutory injunction prohibiting such activity.

[2] Mr. Lockridge's name was misspelled throughout the affidavit.

> That I had retained the personal services of John Lockeridge to serve as my legal counsel in this litigation; but he sent younger, less experienced associates, who were unprepared to represent me at various stages of the proceedings.
>
> That I made the change of counsel when it became obvious that my attorney had not prepared for the up coming (sic) hearing. . . . (footnote added; original paragraph numbering omitted)

In further support of her motion for continuance, Wife also filed the affidavit of her new attorney, Johnny Dunaway, who stated that two days was insufficient time for him to get adequately prepared for the March 9 hearing. Although the record does not contain an order granting the request for a continuance, the request apparently was granted.

After Egli started his own law firm, he undertook to represent his wife who is the plaintiff in a separate lawsuit styled *Rose v. Swann*, filed in the Knox County Circuit Court and which apparently still is pending. The defendant in this other lawsuit, which was filed in 2006, is Judge Swann.

Returning to the present case, the parties continued to file numerous post-divorce motions, and there were several rulings adverse to Wife. On November 15, 2007, Wife filed a motion to recuse. The basis for the motion to recuse was that Wife, in addition to being represented by attorney Dunaway, had just retained Egli to represent her.[3] Wife alleged that because her new attorney was representing his wife in a different lawsuit filed against Judge Swann, that Judge Swann had a conflict of interest and could no longer preside over the present case.

Husband opposed the motion to recuse. According to Husband, Wife successfully sought the continuance of the March 9, 2007, hearing because she had terminated her attorneys and hired new counsel. One of the reasons for terminating her original attorneys was because she was dissatisfied with the performance of Lockridge & Valone, PLLC's "younger, less experienced associates" of which there were only two, Egli and Sammi Mayfair. Husband argued Wife had rehired Egli, whose previous legal work was part of the reason Wife terminated her original attorneys, solely for the purpose of creating a conflict of interest based on Egli's representation of his wife in the *Rose v. Swann* lawsuit. In short, Husband argued that Wife rehired Egli in order to get a new judge assigned to this case.

After Husband filed his response to the motion to recuse, Wife filed a second affidavit. According to Wife's second affidavit, when she filed her first affidavit in support of her motion for a continuance, she meant to say that she was dissatisfied only with associate Mayfair and not associate Egli, even though that is not what she said. Wife characterized her inclusion of Egli

[3] Approximately two weeks later, Dunaway filed a motion to withdraw as Wife's attorney of record. That motion was granted on December 18, 2007. This left Egli as Wife's only attorney of record.

as one of the associates she was dissatisfied with in her first affidavit as merely a "typographical error."

Following a hearing on the motion to recuse, the Trial Court made the following observations and findings from the bench:

> [The Court is confronted with] a balancing act between the appearance of impropriety of this judge to continue to sit on the case, and the preservation of the integrity of the Court when confronted with underhanded conduct.
>
> Mr. Egli makes it quite clear that which all of us knows, to wit: The appearance of impartiality is impaired for a judge if that judge is a defendant in a lawsuit brought by that counsel. That's self-evident. You don't even have to go to law school to know that. The man on the street knows that.
>
> So were that all, then this argument today would be a no-brainer, were that all. That having been said, I do want to make it clear on the record that this judge emphasizes only the appearance of impropriety here. I have no dislike, whatsoever, for [Wife] or for [Husband] or [Egli]. . . . [T]here is no reason for this judge to withdraw from this case based [on] actual malice or dislike. But then that is something that only this judge can know, and the man on the street would find perhaps questionable. . . .
>
> As indicated above, a balancing act which the Court must do, is to balance that facial impropriety against the injustice being done to the Court system by Wife's inconsistent positions taken in this litigation. . . .
>
> Earlier, [Wife] took the position that the associates in the law firm – and at that time there were two, Mr. Egli and Ms. Mayfair – were quote, "younger, less experienced associates who were unprepared to represent me at various stages of the proceedings."
>
> And further that, quote, "I discharged counsel for cause and did not make the change [in attorneys] for the purpose of delaying proceedings in this case." Close quote.
>
> The Court wishes to make a finding in the record today [lest] there be any doubt that of the two associates, it was Mr. Egli who . . . did the heavy lifting at the time in question and who, in fact, tried the 9-hour hearing before the Special Master in this cause. [Wife] has taken the position in this litigation which is inconsistent from her

> present retention of Mr. Egli. It is [Wife] who has done this. She is barred from asserting any flaw in Mr. Egli before this Court today. She is barred from asserting any reason that would compel this judge to withdraw from the case because she is engaging, as the case law says, in cynical gamesmanship. . . . What reason, indeed, would there be for [Wife] to hire Mr. Egli after dismissing him, the firm and the associates earlier for cause other than gamesmanship? She's filed an affidavit that is critical of the associates in this cause and in this litigation, and now she is estopped to raise the issue of Mr. Egli's representation of her.
>
> This is a shifting of positions to suit a party. She is estopped to do that. It is fundamentally unfair. It attacks the integrity of the litigation process. . . . The Court cannot allow an abuse of judicial process by cynical gamesmanship. The motion to recuse . . . is denied.

The order denying the motion to recuse contains the same reasoning as the comments made after the hearing. Specifically, the Trial Court stated:

> [Wife] is barred from asserting any reason that would compel the Judge to withdraw from this case because she is engaging in cynical gamesmanship. In this regard, [Wife] filed an Affidavit that was critical of the associates in this cause and in this litigation, and now she is estopped to raise the issue of Mr. Egli's representation of her, inasmuch as he was one of the former associates previously criticized by her. As this is a shifting of positions to suit a party, she is estopped in doing this. To allow [Wife] to raise this issue, at this stage of the litigation, is fundamentally unfair and it attacks the integrity of the litigation process.

Wife filed a request for permission to appeal with this Court pursuant to Tenn. R. App. P. 10, which we granted. The sole issue on this interlocutory appeal is whether the Trial Court erred when it denied Wife's motion to recuse.

Discussion

In the recent case of *Bean v. Bailey*, No. E2007-02540-SC-S10-CV, — S.W.3d —, 2009 WL 792770 (Tenn. Mar. 26, 2009), our Supreme Court set forth the following discussion with regard to motions to recuse:

> Whether a trial judge should grant a motion for recusal is within the discretion of the trial judge. *Slavin*, 145 S.W.3d at 546. Such a decision "will not be reversed unless a clear abuse [of discretion] appears on the face of the record." *Davis v. Liberty Mut. Ins. Co.*, 38

> S.W.3d 560, 564 (Tenn. 2001) (alteration in original). "[A] trial court has abused its discretion only when the trial court has applied an incorrect legal standard, or has reached a decision which is illogical or unreasonable and causes an injustice to the party complaining." *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006).
>
> Tennessee Supreme Court Rule 10, Canon 3(E)(1) states, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer. . . ." We have held that a recusal motion should be granted when "the judge has any doubt as to his or her ability to preside impartially in the case" or "'when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.'" *Davis*, 38 S.W.3d at 564-65 (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994)). Even if a judge believes he can be fair and impartial, the judge should disqualify himself when "'the judge's impartiality might be reasonably questioned'" because "the appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Id.* (quoting Tenn. Sup. Ct. R. 10, Canon 3(E)(1)).

Bean, 2009 WL 792770, at *6.

At the outset, we note that Judge Swann has recused himself from other cases in which Egli is the attorney of record, and our resolution of this appeal is not intended in any way to affect or analyze the propriety of Judge Swann's recusal of himself from those cases.

Judge Swann correctly stated that it is a "no-brainer" that, at a minimum, his impartiality might reasonably be questioned. *See* Tenn. Sup. Ct. R. 10, Canon 3(E)(1). But this does not end our inquiry because Judge Swann further found that Wife's re-retention of Egli was solely for an improper purpose, i.e., to create a conflict of interest so a new judge would be appointed to the case. While we have not summarized all of the pleadings filed in this litigation because many of them have no direct bearing on the recusal issue, we did note that there were several post-trial rulings that were adverse to Wife. These rulings by the Trial Court lead us to conclude that, before Egli reemerged in this case, Wife likely was not pleased with Judge's Swann's recent rulings.[4]

Wife filed an affidavit expressing her displeasure with the legal services performed by the "associates" at Lockridge & Valone, PLLC, of which there were only two: Egli and Sammi Mayfair. It was this displeasure that formed the basis for Wife terminating Lockridge & Valone, PLLC, two days before an important hearing, thereby creating Wife's need for a continuance, which

[4] These rulings are not at issue on this appeal.

she received. Wife then rehired Egli, with whom she has expressed under oath her displeasure, following several adverse rulings by Judge Swann. Wife's second affidavit wherein she claimed she did not intend to include Egli as one of the attorneys with whom she was displeased and his inclusion in her first affidavit was merely a typo is disingenuous at best.

We conclude that the evidence does not preponderate against the Trial Court's finding that the reason Wife rehired Egli was solely to create a conflict of interest, force Judge Swann to recuse himself, and obtain a new judge who might well be more favorable to Wife. The issue then becomes whether a party who, very late in the lawsuit, intentionally creates a clear conflict of interest for the sole purpose of obtaining a new trial judge can successfully assert that conflict of interest and have the original trial judge removed. We conclude that she cannot. Such activity is nothing short of legal gamesmanship, as correctly pointed out by Judge Swann. This result is even more appropriate when, as here, the party asserting the conflict has successfully taken an inconsistent position earlier in the litigation. At the very least, we cannot conclude that Judge Swann "abused his discretion" when he denied the motion to recuse for this reason. *See Bean*, 2009 WL 792770, at *6.

Wife also claims that she is entitled to an award of attorney fees because she had to go to the trouble of filing an appeal over Judge Swann's erroneous ruling on the recusal issue. For obvious reasons, Wife's request for attorney fees is denied.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Melissa Ann Bishop, and her surety, for which execution may issue, if necessary.

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D. MICHAEL SWINEY, JUDGE